Supreme Court, U.S.
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No. 91-1908

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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LAWRENCE H. CRANDON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals applied an improper standard of review in reversing the district court's determination that the government's position in the underlying action was not "substantially justified" under the Equal Access to Justice Act, 28 U.S.C. 2412.

2. Whether, in any event, a state statute requiring an employer to pay attorney fees precludes the employee's recovery of those fees from the United States under the Equal Access to Justice Act.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 957 F.2d 1161. The opinion of the district court (Pet. App. 25a-31a) is reported at 747 F. Supp. 319. The opinion of the district court on the merits (Pet. App. 32a-45a) is reported at 653 F. Supp. 1381; the opinion of the court of appeals reversing the district court's judgment on the merits (App., *infra*, 1a-15a) is reported at 845 F.2d 476.[1]

### JURISDICTION

The judgment of the court of appeals was entered on March 3, 1992. The petition for a writ of cer-

[1] The judgment of the court of appeals on the merits was in turn reversed by this Court. 494 U.S. 152 (1990).

tiorari was filed on May 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The Equal Access to Justice Act, 28 U.S.C. 2412 (d)(1)(A), provides that:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

## STATEMENT

1. The underlying dispute in this case arose from the provision by Boeing Company of lump sum payments to petitioners, who were leaving their employment with Boeing to accept high level positions in the federal government. These payments were based on prospective considerations, including the difference between petitioners' salaries from Boeing and the salaries they would receive from the government during their expected terms of federal employment. In a complaint filed on July 22, 1986, the government sought damages for breach of the fiduciary duty each employee owed to the United States, as that duty is defined under the common law and by reference to the standard set under a criminal statute, 18 U.S.C. 209, that prohibits private supplementation of the

salary of a federal employee. *Crandon* v. *United States*, 494 U.S. 152, 156 (1990).

Pursuant to Section 145 of the Delaware Corporation Law, Del. Code Ann. tit. 8 (1991), Boeing passed a corporate resolution a few months before suit was filed, authorizing the general counsel of Boeing to pay "all expenses, including attorneys' fees, that are reasonably and actually incurred by any such current or former Employee in obtaining legal advice" concerning the government's investigation and suit. C.A. App. 62-63.[2]

The district court dismissed the government's suit. It held that Section 209(a) does not apply to lump sum payments made by an employer prior to the time the employee enters government service. The court of appeals reversed. App., *infra*, 1a-15a. This Court granted certiorari and reversed, agreeing with the district court that Section 209(a) prohibits only payments made during government service. 494 U.S. 152, 168 (1990).

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[2] Three of the five petitioners (Jones, Kitson, and Reynolds) executed agreements with Boeing in June 1986 to repay any fees advanced by Boeing unless it was determined that the defendants were entitled to be indemnified under Delaware law and the Boeing corporate by-laws C.A. App. 54-56. Petitioner Paisley entered into a similar agreement with Boeing in August 1987 (*id.* at 57). Boeing advanced all the fees of these petitioners incurred after the dates of their agreements—indeed, Boeing advanced fees and expenses to defendant Paisley beginning in April 1987, well before his execution of the repayment agreement (*id.* at 51). Petitioner Lawrence Crandon, who was still a federal employee when the case was brought, was not covered by the Boeing corporate resolution (*id.* at 63), did not enter into such an agreement, and thus did not receive advances of his attorney's fees.

2. On remand to the district court, the individual defendants all sought attorney's fees under the Equal Access to Justice Act.[3] The district court noted that petitioners' fees had been advanced by Boeing "with the understanding that all monies would be repaid unless, at a later date, Boeing's Board of Directors determined that [petitioners] should be indemnified." Pet. App. 27a.[4] The court held that this fee arrangement left petitioners liable for fees and they had thus "incurred" fees for purposes of EAJA. Pet. App. 27a-28a. It rejected the government's argument that petitioners have not incurred fees which Boeing has an unqualified obligation under Del. Code Ann. tit. 8, § 145(c) (1991) to pay.[5]

The district court then found that EAJA fees should be assessed against the government, because its position on the merits of the dispute was not sub-

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[3] Boeing did not seek EAJA fees, apparently because it is not an eligible "party," defined in 28 U.S.C. 2412(d)(2)(B)(ii) as excluding corporations with a net worth exceeding $7 million or with more than 500 employees.

[4] Although petitioner Crandon's fees had not in fact been advanced to him by Boeing (see note 2, *supra*), he, like the other petitioners, has an unqualified right under Delaware law to require Boeing to pay them. See note 5, *infra*.

[5] Section 145(c) requires the corporation to indemnify its officers, directors and employees when such an individual prevails in a suit brought against him by reason of his position, stating:

> To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding [arising out of his corporate affiliation], or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

stantially justified. Pet. App. 28a-30a. The court gave little weight to the fact that the government had prevailed in its interpretation of Section 209(a) before the court of appeals, because this Court had reversed. Pet. App. 29a.[6] The district court accordingly awarded to petitioners fees and costs totaling $553,898. Pet. App. 47a-49a, 51a.

3. The court of appeals again reversed. Pet. App. 1a-24a. The court held that petitioners had not "incurred" fees because Section 145(c) of the Delaware Code "unconditionally required Boeing to indemnify [petitioners] for all of their attorney fees and costs." Pet. App. 5a. The court observed that it would be unseemly to assume that Boeing "would default deliberately on its legal obligation, or, even more questionably, would conspire with [petitioners] to alter the intended operation of the EAJA by jointly disregarding the legal right and duty." Pet. App. 7a.

The court of appeals also reversed the district court's holding that the government's position lacked substantial justification. The court recognized, and thoroughly analyzed (Pet. App. 8a-15a), the deferential standard of review of such district court holdings required by *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Applying this standard to the particular facts at issue here, and according the district court "the deference we think *Pierce* commands," Pet. App. 15a, the court of appeals nevertheless rejected the district court's reliance on this Court's decision in *Crandon* to establish a lack of substantial justifica-

[6] Despite the court of appeals' decision, the district court ruled that there was no ambiguity in Section 209(a) (Pet. App. 28a), and that there was no support for the government's interpretation of Section 209(a) in the language of the statute or its legislative history. Pet. App. 28a-29a.

tion.[7] The court concluded that the district court's finding that the government lacked substantial justification for its position on the merits was "under *Pierce*'s standard, an 'abuse of discretion.'" Pet. App. 19a. Judge Hall dissented from both alternative grounds for the court's holding. Pet. App. 20a-24a.

## ARGUMENT

Neither of the alternative holdings of the decision below conflicts with any decision of this Court or with any decision of any other courts of appeals. Rather, both holdings represent fact-bound applications of the standards articulated by this Court in *Pierce*, and of general EAJA principles, to the particular facts of this case. There is accordingly no need for further review by this Court.

1. Petitioners contend that the court of appeals engaged in de novo review of the district court's award of fees. That claim is flatly inconsistent with the analysis of the opinion below.

a. The court of appeals clearly recognized and applied the deferential abuse-of-discretion standard of *Pierce*.[8] The court of appeals reversed the district

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[7] The court found in the two principal opinions in *Crandon* a "recognition of the difficulty of the interpretative issue, hence the reasonableness of the Government's position." Pet. App. 15a-16a. The court observed that both the majority opinion of Justice Stevens and the concurring opinion of Justice Scalia had noted that the statute was ambiguous and had relied on the rule of lenity to resolve the ambiguity in favor of petitioners. Pet. App. 16a-17a.

[8] The court stated that "[w]e are required to review this decision of the district court under [the] abuse of discretion standard" (Pet. App. 9a), and that "even with respect to misapprehensions of controlling law, our review must be deferential in obedience to *Pierce*" (Pet. App. 10a).

court only after concluding that "despite the deference we must accord even those district court EAJA decisions that we may think legally 'wrong,' we think this one sufficiently wrong * * * that we must consider it, under *Pierce*'s standard, an 'abuse of discretion.'" Pet. App. 19a.

The court of appeals correctly refused to construe *Pierce* as requiring a reviewing court to "rubber-stamp" a lower court's decision. Pet. App. 10a. See *United States* v. *Taylor*, 487 U.S. 326, 336 (1988) ("a decision calling for the exercise of judicial discretion 'hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review'"). Instead, the court of appeals expressly "follow[ed] the general review process *Pierce* charted," looking first to objective indicia to assess the strength of the government's merits position and then making an "independent assessment of the merits of the Government's position." Pet. App. 11a. Far from constituting "de novo" review as petitioners assert, this process is simply the "thorough appellate review" mandated by this Court for applying the abuse of discretion standard. *Taylor*, 487 U.S. at 336.[9]

b. Petitioners also incorrectly assert (Pet. 22-25) that the court of appeals limited its inquiry to the legal strength of the government's underlying case,

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[9] The Fourth Circuit's "independent assessment" challenged by petitioners (Pet. 21) is precisely the process this Court undertook in *Pierce* in applying the abuse of discretion standard. As the court of appeals realized, "[i]n order to declare that discretion has been abused, or clear error committed in finding facts, a substantial canvassing of the relevant materials may be required in any case of significant complexity." Pet. App. 10a-11a, n.3, citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 581 (1985) (Powell, J., concurring).

rather than deferring to the district court's consideration of all the relevant factors in making a determination of substantial justification.

As the court of appeals and the district court both recognized, the issue here is whether the government's construction of the scope of Section 209(a) was substantially justified. Contrary to petitioners' assertion (Pet. 23), the court of appeals' assessment of the strength of that position took into account a variety of factors, including the fact that this case was the first to be brought under Section 209(a). Although the court considered that factor, it properly concluded (Pet. App. 12a) that it did not establish that the government's position was unjustified. The court instead recognized that there are many legitimate reasons having nothing to do with the strength of the merits of the government's interpretation of Section 209(a) that would explain the absence of prior cases.

In assessing the substantial justification for the government's position with regard to the scope of Section 209(a), the court of appeals painstakingly reviewed the majority and concurring opinions in *Crandon*. Observing that this Court had relied heavily on the rule of lenity in holding for petitioners on the merits, the court of appeals reasoned that this reliance itself indicated the error of the district court's conclusion that Section 209(a) was unambiguous. Pet. App. 17a-18a. This conclusion is plainly correct.[10]

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[10] The rule of lenity comes into play only when there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even "[a]fter [a court has] 'seize[d] every thing from which aid can be derived * * *' [it is still] left with an ambiguous statute," *United States* v. *Bass*, 404

In addition, the court conducted a thorough analysis of the reasoning suporting this Court's decision in *Crandon*, and concluded that "[w]e are satisfied that any legally trained reader of the two *Crandon* opinions would see in them a Court concerned with a serious issue of statutory interpretation." Pet. App. 17a. Petitioners do not address this analysis, which disposes of the district court's simplistic reliance on the result of *Crandon*.[11]

c. Petitioners suggest (Pet. 24-25) that the lack of substantial justification is indicated by Boeing's purported long-standing practice of making severance

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U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). See also *Chapman* v. *United States*, 111 S. Ct. 1919, 1926-1927 (1991). By applying the rule of lenity, this Court necessarily recognized the ambiguity of Section 209(a).

[11] Petitioners similarly rely simply on the result in *Crandon*, asserting (Pet. 26) "[a]ll nine Justices of this Court concluded that a lump sum paid prior to entry into government service could not possibly violate the language of the statute." As the court of appeals correctly recognized, the unanimity of the result for petitioners is less significant than the reasoning of the Court in *Crandon*. That reasoning was far from unanimous. Justice Scalia, joined by Justices O'Connor and Kennedy, concurred in the result, but accepted the government's argument that payments taking place prior to employment may be covered by Section 209(a), stating that "I do not think that payments which are made before or after the term of federal employment are necessarily excluded from § 209(a)." (494 U.S. at 168) (Scalia, J. concurring). Justice Scalia's approach was, in turn, criticized by the majority (494 U.S. at 159-160 n.10). This split in views demonstrates that the government's position reflected "a 'genuine' dispute," and presented a legal question as to which "reasonable people could differ," *Pierce*, 487 U.S. at 565—precisely the reasonableness standard employed by the court of appeals (Pet. App. 8a).

payments. Of course, normal severance payments—those that are made available to employees without regard to future government employment—do not fall within the statutory prohibition. But the Fourth Circuit found—in a portion of its earlier opinion left undisturbed by this Court—that the payments in this case, while called "severance payments" by Boeing and petitioners, were actually specifically intended by Boeing to compensate these individuals for their prospective government employment. App., *infra*, 3a. There was ample evidence in the record that Boeing chose these individuals for the "severance" subsidy because of perceived advantages to Boeing's commercial interests of having these individuals in high governmental positions [12]—a potential conflict of interest that creates precisely the appearance of impropriety that Section 209(a) is intended to address. See *Crandon*, 494 U.S. at 167-168 ("as the Government correctly argues, [the payments] give rise to a possible appearance of impropriety that is certainly one of the concerns of § 209(a)"). These perceived advantages demonstrate that the payments involved in this case are quite different from the usual severance

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[12] For example, payment to petitioner Crandon was recommended by the President of Boeing Aerospace Co. [BAC] on the grounds that Crandon would "be an asset to Boeing in the NATO arena." 87-2054 Jt. App. at 60 (4th Cir.). Payment to petitioner Kitson was recommended on the grounds that his "job with the DOD is viewed as bigger than Crandon's—and has greater influence relative to BAC" (*id.* at 58). Petitioner Reynolds' payment was recommended on the grounds that "Reynolds will hold a *key* job." *Id.* at 50. Payment to petitioner Jones was recommended because of "the potential benefit to Boeing of having T.K. [Jones] return when this assignment is completed" and because "[n]eedless to say, having someone with his views will be helpful to us *while* he is in Washington, D.C." *Id.* at 18.

payments. Indeed, petitioners all received normal severance payments in addition to the payments challenged by the government in this action. App., *infra*, 3a.

The applicability of Section 209(a) to this particular kind of payment presented a case of first impression. App., *infra*, 4a. The absence of prior enforcement efforts reflects only the fact that such payments had not previously come to light.[13] The district court's characterization of the kind of payment at issue here as simply "a severance payment" (Pet. App. 28a) was a clearly erroneous assessment of the facts and thus an abuse of discretion. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (district court abuses its discretion when it bases ruling on a clearly erroneous assessment of the evidence). In any event, the characterization of the particular payments at issue here presents no issue warranting certiorari.

2. Petitioners also disagree with the alternative holding of the court of appeals that they did not "incur" fees for which they can be reimbursed under EAJA. But since the court's conclusion that no EAJA fees may be assessed against the government because its position was substantially justified affords a fully sufficient basis for the judgment below, there is no need for this Court to address this alternative holding. That holding is, in any event, correct, and the discussion of the court of appeals of this question does not conflict with the decision of any other court.

Section 2412(d)(1)(A) provides for the award to an eligible party of "fees and other expenses * * *

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[13] The lack of similar cases does, moreover, refute petitioners' suggestion (Pet. 11-12) that the issues presented by this case are of broad applicability.

incurred by that party." The court of appeals interpreted that provision to preclude the payment of fees where a state statute requires a non-eligible third party to pay those fees.

Petitioners contend that they "incurred" fees because they initially assumed the obligation to pay their attorneys, and would remain liable to them if Boeing should refuse to make the payments.[14] This contention is inconsistent with the statutory scheme. Under EAJA, the question whether a party has incurred fees must be determined at the conclusion of the case, because a fee award is permitted only after the claimant has prevailed—a determination that can be made only at the conclusion of the litigation. Here, at the conclusion of the case, petitioners have not incurred any liability for fees precisely because Boeing —and not petitioners—is liable for those fees under

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[14] Petitioners do not dispute the court of appeals' legal conclusion that Boeing is legally obligated to indemnify them under Section 145(c) of the Delaware Code. They simply assert that "Boeing * * * might argue that the amount of expenses incurred was unreasonable" or that the original suit had not been brought against petitioners "by reason of the fact" that they were Boeing employees. Pet. 18-19.

These contentions were properly rejected by the court of appeals. Pet. App. 6a n.2. Boeing, in its agreement to advance the claimed fees, has already legally determined that petitioners were sued "by reason of the fact" petitioners were Boeing employees. Indeed, Delaware law expressly required such a determination to enable Boeing to advance the fees. Del. Code. Ann. tit. 8, § 145(b) (1991). Moreover, Boeing has been paying these fees all along for four of the five individual defendants. Petitioners cite no support for the speculation that Boeing might now seek reimbursement from these individuals based on the contention that the fees it has been paying without demur were excessive.

state law.[15] Even if, under state law and their agreements with Boeing, petitioners bore some potential liability for fees before the successful conclusion of the litigation, EAJA is simply not designed to protect against that sort of potential liability. Until the conclusion of litigation, *every* potential petitioner for fees under EAJA bears the risk of paying attorney's fees if he fails to prevail, or if the government's position is substantially justified.

As the court of appeals observed (Pet. App. 7a-8a), the determination that petitioners did not incur fees is consistent with the purposes of EAJA. Awarding fees to claimants who bear no risk of liability for fees for successful litigation does not facilitate challenges to inappropriate government actions. The purposes of EAJA are not served by awarding fees that will simply benefit an ineligible litigant.

The decision below is consistent with the uniform interpretation of EAJA by other courts of appeals. For example, in *SEC* v. *Comserv Corp.*, 908 F.2d 1407, 1416 (8th Cir. 1990), the court denied EAJA fees to a corporate officer because the fees "if received, would be passed on to an ineligible litigant."[16] Other courts have also agreed that fees must be de-

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[15] It is accordingly unnecessary to decide in this case whether the same result would follow where an EAJA claimant has an unenforceable agreement with a third party who has offered to pay the fees.

[16] Petitioners seek to distinguish *Comserv* as involving a situation where the corporation had agreed to pay fees from the outset of the litigation (Pet. 15-16), but that agreement was merely one factor in the Eighth Circuit's reasoning: "even if Comserv and [the officer] had not entered into this agreement, Comserv * * * would have been required to indemnify [the officer] under [the applicable state corporation law]." 908 F.2d at 1413.

nied if such fees would merely be passed on to an ineligible party. See *Wall Indus., Inc.* v. *United States*, 15 Cl. Ct. 796 (1988), aff'd, 883 F.2d 1027 (Fed. Cir. 1989) (denying EAJA fees to an otherwise eligible litigant where it was merely serving as a "stand in" for an ineligible party); *Unification Church* v. *INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) ("where the fee arrangement among the plaintiffs is such that only some of them will be liable for attorney's fees, the court shall consider only the qualification *vel non* under the [EAJA] of those parties that will be themselves liable for fees if court-awarded fees are denied"); *American Association of Retired Persons* v. *EEOC*, 873 F.2d 402, 407 (D.C. Cir. 1989); *In re Davis*, 899 F.2d 1136, 1144 (11th Cir.), cert. denied, 111 S. Ct. 510 (1990) ("the real party in interest is the party who will pay the attorney fees if the government does not") (citation and brackets omitted).[17]

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[17] Petitioners, while correctly recognizing (Pet. 15) that the disagreement does "not ris[e] to the level of a split in the circuits," assert that the decision below is "at odds" with the Federal Circuit's decision in *Phillips* v. *General Services Administrator*, 924 F.2d 1577 (1991). *Phillips* holds that a party incurs fees under EAJA if he is bound by a contingency agreement to pay to his attorney any statutory fees awarded by the court. Noting that the fee award belongs to the party rather than the attorney, the *Phillips* court stated that "to be 'incurred' within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative" (924 F.2d at 1582-1583). The record here is barren of any indication that these petitioners entered into any such agreements with their counsel. *Phillips*, which cites *Comserv* with approval (924 F.2d at 1583 n.5), is in fact entirely consistent with the conclusion of the court below. Under her contingency agreement, Phillips' obligation to pay her counsel was created

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

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*after* she prevailed on the merits, while petitioners' obligation was extinguished, by operation of state law, at that point. As we have explained, EAJA turns on the obligations that exist after the termination of the litigation.

## APPENDIX

## UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

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No. 87-2054

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

*v.*

THE BOEING COMPANY, INC.; MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT REYNOLDS; HAROLD J. KITSON; LAWRENCE H. CRANDON, DEFENDANTS-APPELLEES

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Argued Dec. 3, 1987

Decided May 5, 1988

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Before HALL and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

ERVIN, Circuit Judge:

In 1981 and 1982, five Boeing Company ("Boeing") employees left the company to assume high-level positions in the Reagan administration. Before their federal employment began, Boeing made a large "severance payment" to each one with the payments totalling $485,000. In 1986, the government instituted this civil action to recover the amount of the payments from both Boeing and the individual employees based on 18 U.S.C. § 209(a),[1] a conflict of interest statute. At trial, the district court found for de-

fendants. *United States v. Boeing Co.*, 653 F.Supp. 1381 (E.D.Va. 1987). The government appeals. We affirm in part and reverse in part.

## I. The Facts

During 1981 and 1982, the federal government recruited the five individual defendants for positions in the Department of Defense (DOD) or NATO. Boeing encouraged the men to accept the positions and gave each a significant severance payment upon their termination from Boeing. The details of the payments are as follows.

(1) Thomas K. Jones became Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces on June 1, 1981. He received $132,000 from Boeing on May 19, 1981.

(2) Herbert A. Reynolds became a Defense Department consultant on July 26, 1981, and Deputy Director of Space and Intelligence Policy on October

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[1] § 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, or any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

4, 1981. He received $80,000 from Boeing on July 22, 1981.

(3) Melvyn R. Paisley became Assistant Secretary of the Navy for Research, Engineering and Systems on December 2, 1981. He received $183,000 from Boeing on October 1, 1981.

(4) Lawrence H. Crandon became a computer scientist for the NATO Air Command and Control Systems Team on March 8, 1982. He received $40,000 from Boeing on March 5, 1982.

(5) Harold Kitson became a Defense Department consultant on August 2, 1982, and Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence in September, 1982. He received $50,000 from Boeing in July 31, 1982.

While T.A. Wilson, Boeing's chairman and chief executive officer, determined the actual amount of each payment, lower level employees and the departing employees made preliminary calculations based on the financial impact of moving from Boeing to the government. Calculation factors included salary and benefit differentials, higher living costs, moving expenses, and the expected length of government service. A separate payment not at issue here cashed out the employees' interests in existing benefits. Boeing made a total of twenty-one such severance payments between 1962 and 1982 to encourage government service and sever all financial ties between Boeing and the departing employees. Employees entering government service at the state and local levels were allowed to go on paid leave instead of resigning.

The existence and the amount of the payments were disclosed initially in Financial Disclosure Reports filed by each individual. In late 1981, employees of the Defense Contract Audit Agency (DCAA) became aware of the nature of the payments. Boeing sought

to include the payments in overhead calculations, in effect charging the government for them. Later, Boeing agreed not to include them in overhead. On March 22, 1982, the DCAA notified the DOD contracting officer for Boeing of the payments and their nature. The matter was referred to the Justice Department on July 14, 1982. After an unexplained delay of nearly three years, the Justice Department and Boeing executed an agreement tolling the statute of limitations on March 25, 1985. The government filed this action on July 22, 1986.

In a bench trial, the district court found for the defendants reasoning that: (1) severance payments made prior to government employment do not violate the standards of § 209; (2) subjective intent is required to violate § 209, and no intent was shown; (3) because the payments were disclosed, they did not violate common law agency principles which prohibit only secret, undisclosed profits; (4) the payments created neither the appearance of nor an actual conflict of interest; and (5) the three year statute of limitations, 28 U.S.C. § 2415(b), bars the claims against Boeing for the first four payments.

The issues on appeal are whether § 209 applies to severance payments made prior to government service, whether § 209 includes an intent element, whether § 209 includes an injury element, and the statute of limitations.

## II. 18 U.S.C. § 209

This is a case of first impression in which the government seeks to apply the standards of § 209 in a civil action to recover severance payments made before five individuals began their government employment. Section 209(a) provides, in relevant part:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States . . .; or
>
> Whoever . . . pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Although the conflict of interest statutes, including § 209, are criminal in nature, civil remedies exist based on the fiduciary duty owed by federal employees. *See United States v. Kenealy*, 646 F.2d 699, 703 (1st Cir.), *cert. denied*, 454 U.S. 941, 102 S.Ct. 478, 70 L.Ed.2d 250 (1981); *United States v. Kearns*, 595 F.2d 729, 733 (D.C.Cir.1978); *Continental Management, Inc. v. United States*, 527 F.2d 613, 617, 208 Ct.Cl. 501 (1975). That duty is defined by the statutory standard of conduct. *Kenealy*, 646 F.2d at 703; *Continental Management*, 527 F.2d at 617, 620. Therefore, the government has a civil cause of action based on the statutory standards of § 209.

*A. Preemployment Severance Payments*

Section 209 prohibits outside "contribution to or supplementation of salary, as compensation for his services as an officer or employee" of the United States. On its face, this does not require that payment occur while the party was a government employee. The district court, however, read § 209 to re-

quire payment during government employment. *Boeing*, 653 F.Supp. at 1386; *see also United States v. Raborn*, 575 F.2d 688 (9th Cir. 1978) (in dicta, stating that status as an employee is an element of a violation of § 209). Because the statutory language is ambiguous, we turn to the legislative history of § 209.

Prior to 1962, § 209 was codified at 18 U.S.C. § 1914, and provided "[w]hoever, being a Government official or employee, receives any salary in connection with his services. . . ." In 1962, Congress eliminated the phrase "being a Government official or employee," a phrase which did require employment status at the time of payment. This change indicates that payment need not occur during federal employment; a preemployment payment to supplement salary could also violate § 209.

The policy behind § 209 and the conflict of interest laws in general also support a broad interpretation of its coverage. The statutes are

> directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil.

*United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562, 81 S.Ct. 294, 315, 5 L.Ed.2d 268 (1961). Congress has established rigid rules of conduct to ensure that this faith is maintained. *Id.* at 551, 81 S.Ct. at 310; *Kenealy*, 646 F.2d at 703; *Con-*

*tinental Management*, 527 F.2d at 620. Large severance payments by defense contractors to those going to work at high levels in the Defense Department certainly "arouse suspicions," and those suspicions are not reduced by making the payments just before government service begins.

Therefore, we conclude that payments made prior to the onset of federal service can violate § 209. Employment status at the time of payment is not an element of a violation. All preemployment payments do not necessarily run afoul of § 209, so we must still determine whether these payments were made to supplement salaries "as compensation for . . . services as an officer or employee of the United States."

*B. Intent*

The government argues that the conflict of interest statutes, including § 209, set forth an objective standard of conduct which does not include an intent requirement. This ignores the language of § 209, that payments must be made "as compensation for" services as a government employee. The district court found that neither Boeing nor the individual defendants intended the payments to be compensation for their government services.

The court's finding was based largely on statements by the individual defendants and others at Boeing that the payments were not made with that intent. Other evidence in the record contradicts these statements. First, the payments were calculated in large part based on the financial impact of moving from Boeing to the government. The individual defendants and other Boeing employees calculated salary, benefits and cost-of-living differences over the expected term of government employment. The chairman, who

decided the ultimate amount, received a recommendation and was aware of the factors used to reach that figure. Second, Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment. These financial penalties include lower salary and benefits, so the payments were advance supplements to ease the pain of transition. Third, the parallel practice of providing paid leave for state and local service suggests that payments to federal employees were designed to do the same thing without technically violating § 209. Finally, the fact that in twenty-five years only twenty-one such payments were made, and only to those entering high level government service similarly suggests an intent to supplement the federal salaries of a limited number of employees. Viewing all of the evidence, we find that the five payments here were made with compensatory intent, and that the trial court's finding of no such intent was clearly erroneous.

*C. Injury*

The defendants vigorously argue that the government was not injured by the payments because there was neither the appearance of nor an actual conflict of interest. Testimony as to their exemplary work records and the absence of complaints within DOD was offered to prove that no injury occurred. This ignores the preventive nature of the conflict of interest laws, that the appearance of conflicts rather than actual conflicts or corruption is all that is necessary. *See Mississippi Valley*, 364 U.S. at 549, 561-62, 81 S.Ct. at 315; *Kearns*, 595 F.2d at 734; *Continental*

*Management*, 527 F.2d at 618. The appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption. The knowledge and approval of superiors does not alleviate the situation. *Mississippi Valley*, 364 U.S. at 561, 81 S.Ct. at 315.

Similarly, the defendants argue that their disclosure of the payments negates any injury because under the common law, only secret profits present a conflict. *See Kenealy*, 646 F.2d at 704-05; *Kearns*, 595 F.2d at 734. This action, however, is based on a violation of the standards of § 209, which is not limited to secret compensation. Even if secrecy or nondisclosure was an element here, effective disclosure must be formal, complete, and directed to the proper parties. *Kenealy*, 646 F.2d at 705. Here, the disclosures were statements of total income from Boeing, combining salary and the severance payments in one figure, reported on financial disclosure forms. Blanket disclosures that fail to differentiate ordinary and extraordinary payments are not sufficiently complete to insulate the payments from the conflict of interest laws.

To summarize, we hold that payments made to future federal employees before they begin government service can violate § 209, if they are made with compensatory intent. Injury in the form of corruption or an actual conflict of interest is not required; the appearance of a conflict is sufficient to violate § 209. Specifically, we find the severance payments by Boeing to the individual defendants were made with the intent to compensate for government service and created the appearance of a conflict of interest. Therefore, they violated § 209, and, absent other considerations, the government is entitled to recover the amount of the payments from either Boeing or the individuals.

## III. The Statute of Limitations

### *A. Boeing*

The claim against Boeing is based in tort for the inducement of a breach of duty by the individual defendants and for making payments in violation of § 209. A three year statute of limitations applies under 28 U.S.C. § 2415(b).[2] Boeing executed an agreement tolling the limitations period on March 25, 1985. Therefore, the critical date is three years before that date, March 25, 1982, and the inquiry becomes did the cause of action against Boeing accrue before that date.

The cause of action accrued at the time the tort was committed, here being the date of payment. Four of the five payments occurred before March 25, 1982. The statute of limitations bars the government's claim for those four payments absent something tolling the limitations period. That something, argues the government, is 28 U.S.C. § 2416(c),[3] which excludes from the limitations period any period during which the

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[2] 28 U.S.C. § 2415(b) provides, in relevant part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues . . .

[3] § 2416. Time for commencing actions brought by the United States—Exclusions. For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

* * * *

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances;

material facts are not and reasonably could not have been known by a government official charged with the responsibility to act.

That official, according to the Justice Department, was the DOD contracting officer for Boeing who learned the relevant facts in a memo from the DCAA on March 26, 1982. The government fails to explain, however, why DCAA employees charged with auditing responsibilities were not charged with the responsibility to act here. Conclusory statements that the contracting officer was the first official with the knowledge and ability to recognize a conflict do not justify tolling the statute under § 2416(c) and are refuted by the fact that DCAA employees and managers recognized that a problem existed. The decision to refer that problem to the contracting officer does not diminish their ability to act. Therefore, we find that the statute of limitations was not tolled under § 2416(c), and that four of the five claims against Boeing are time-barred. Only the claim based on the final payment to defendant Kitson on July 31, 1982, falls within the limitations period.

*B. The Individual Defendants*

The individual defendants were not parties to the tolling agreement of March 25, 1985, so the relevant date for claims against them is July 22, 1986, the date the government filed this action. Clearly, any three-year limitations period had expired by then for all five payments. However, violation of § 209 constitutes a breach of the duty of loyalty, and is contractual in nature. *See Jankowitz v. United States*, 533 F.2d 538, 548, 209 Ct.Cl. 489 (1976); Restatement (Second) of Agency, §§ 401 comment a, 403 comment a. Therefore, the six year statute of limita-

tions in 28 U.S.C. § 2415(a)[4] applies. The payments all occurred after July 22, 1980, so none of the claims against the individual defendants is barred.

## IV. Conclusion

We hold that the severance payments made by Boeing in this case violated 18 U.S.C. § 209. The government has a civil cause of action for the amount of each payment against both Boeing and the recipient of that payment, although double recovery by the government is not permitted. The three year statute of limitations in 28 U.S.C. 2415(b), however, bars the government's claims against Boeing for four of the five payments; only its claim based on the Kitson payment survives. The claims against the individual defendants are not time barred. Therefore, the decision below is

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in that part of the majority's opinion finding that four of the five claims against Boeing are

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[4] 28 U.S.C. § 2415(a) provides, in relevant part:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: . . .

barred by the applicable three-year statute of limitations, 28 U.S.C. § 2415(b). I also agree that a six-year limitation period applies to the breach of the duty of loyalty claims against the individual defendants. I cannot join that part of the majority's decision, however, finding that the five payments here were made with compensatory intent. In my view, the district court's judgment should be affirmed in all respects.

Section 209(a) provides, in relevant part, that "[w]hoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services . . . " shall be guilty of a misdemeanor. This language clearly contemplates that, for a payment to violate § 209(a), it must both supplement the employee's salary and also be intended as compensation for the employee's services as an officer or employee of the government. It is evident, therefore, that Congress did not intend that payments were to be proscribed by 209(a) if they were made without culpable intent.

In this case, the district court found that these severance payments were not intended, either by Boeing or the employees, as compensation for their government service. Intent is a factual determination purely within the province of the district court. Here, after hearing substantial testimony and weighing the credibility of numerous witnesses,[1] the district court

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[1] The district court heard testimony from John F. Lehman, Secretary of the Navy, Melvyn Paisley, T.K. Jones and Harold Kitson, Jr.; and had before it the depositions of Charles P. Hogberg, H.K. Hebeler, T.A. Wilson, S.M. Little, Jr., Mark K. Miller, T.K. Jones, Melvyn Paisley, Harold Kitson, Jr., Lawrence H. Crandon; as well as the deposition of the United States.

found as a matter of fact that "[t]he severance payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services." I simply cannot agree with the majority's conclusion that the district court's findings were clearly erroneous.

In reaching its decision, the majority attaches great weight to the fact that Boeing relied in part upon the disparity between what the employees were earning at Boeing and what their anticipated government salaries would be, in calculating the amount of the severance payments. The majority quite correctly found that the severance payments tended to lessen the financial pain experienced by these employees in accepting government service. The majority inexplicably concludes, however, that since these severance payments were supplements, they must have been made with compensatory intent. Thus, the majority fails to articulate a distinction between payments intended as compensation and those which are not. Although the distinction is a fine one, it is clearly a distinction which Congress intended to make in enacting § 209(a).

The severance payments made here were in accordance with a policy followed by Boeing for over twenty years as a matter of good corporate citizenship. As the Secretary of the Navy articulated at trial, the purpose of the payments was to release the employees from their "golden handcuffs," or unvested benefits, as well as sever all financial ties between the employees and the company. Although there is evidence that these severance payments were calculated with the employees' prospective salaries in mind, the district court found that "[t]hose responsible for the

ultimate decision were not aware of the specific calculation method," but approved the payments based upon what was determined to be "reasonable and fair to the departing employee[s]."

The majority minimizes the fact that the government, not Boeing, initiated the efforts to recruit these employees for government service. It is also undisputed that, after accepting government employment, these employees neither were in a position to provide, nor did they in fact provide, preferential treatment to Boeing. In sum, in enacting § 209(a), Congress recognized that a balance must be struck in order to encourage private industry's best minds to enter the public sector. By its holding today, this Court has tipped that balance and advanced a much more restrictive policy than Congress ever intended. For the foregoing reasons, I respectfully dissent.

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